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No. 07-1479

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In The
Supreme Court of the United States

INDYWAY INVESTMENT, a non-associated unincorporated Business Trust Organization by and Through its trustee, Deron Brunson,

Petitioner,

v.

DEBRA OPRI, an individual; OPRI & ASSOCIATES, a Professional Law Corporation,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District

OPRI'S OPPOSITION TO INDYWAY'S PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT
(Supreme Court Rule 29.6)

Respondent Opri & Associates is a professional law corporation. Respondent Debra Opri owns 10% or more of Opri & Associates. No other person or entity owns more than 10% of Opri & Associates.

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I. INTRODUCTION

In this legal malpractice lawsuit, petitioner Indyway Investment ("Indyway") asks this Court to grant review of the California Court of Appeal's unpublished opinion to resolve perceived conflicts between California Revenue and Taxation Code sections 3711, 3691.1, and 4112[1] because Indyway claims that when these statutes are applied, they violate the Fifth and Fourteenth Amendments by taking property without due process of law. Indyway never raised any of these three statutes as issues at trial. Similarly, Indyway never raised sections 3711 or 4112 as issues in its appellant's opening brief ("AOB"). Indyway's AOB. Consequently, apart from one fleeting reference to section 3711, the Court of Appeal – in its *unpublished opinion* – did not issue any ruling on these statutes. A-11.[2] While Indyway tried to raise section 3691.1 as an issue on appeal, the Court of Appeal stated that it would not entertain such an effort: "sections . . . and 3691.1, are not preserved for review because these issues were not raised at trial" and section 3691.1 was not even "addressed in the [trial court's] statement of decision." A-15.

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[1] All further statutory references are to the California Revenue and Taxation Code unless otherwise indicated.

[2] Citations styled "A_" refer to the appendices to the petition. Citations styled "RT," "CT," or "Ex." refer to the California appellate record, i.e., reporter's transcript, clerk's transcript, and trial exhibits lodged with that record.

Even if the California Court of Appeal *had* issued an opinion addressing these three statutes (which it did not), that opinion would not be legal precedent and on no import because the only issue to be decided in this case is whether respondents Debra A. Opri and Opri & Associates (collectively, "Opri") committed malpractice. This legal malpractice suit did not challenge the constitutionality of these statutes and was not brought against a governmental entity, who could have defended the constitutionality of the statutes. In sum, this is not the appropriate vehicle to challenge the constitutionality of these statutes.

Nonetheless, Indyway posits two issues grounded upon these three statutes for this Court's review. Indyway's petition, p. i, Questions Presented. Indyway's petition is patently defective for several reasons.

First and predominantly, this Court's review lies from the Court of Appeal's decision. Supreme Court Rule 10(c). As the Court of Appeal has not issued a decision based on the three statutes set forth in Indyway's petition, there is nothing for this Court to review about these statutes. It is axiomatic that "'[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'" *Pennsylvania Dept. of Corrections v. Yeskey,* 524 U.S. 206, 212-213 (1998) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970)).

Second, Indyway never identifies any ground for review under Supreme Court Rule 10(c), e.g., a state court has decided an important federal question in a way that conflicts with a decision of another state court or a United States court of appeals, a state court has decided an important question of federal law that has not been but should be settled by this court, or a state court has decided an important federal question in a way that conflicts with a decision by this court. Here, as the Court of Appeal never decided an important federal question, there is no ground for this Court's review. In fact, the validity of the California statutes and Indyway's newly-asserted violation of constitutional due process allegation were never in issue since this case and Indyway's appeal arise out of a legal malpractice claim, which never challenged the constitutional validity of the statutes.

Irrespective of Indyway's faulty petition, these statutes are not in conflict and do not violate due process, as asserted by Indyway. As discussed below, they are clear and operate in harmony with each other and afford all necessary due process requirements. Considering the substantial evidence adduced in Opri's favor at trial (A-3 – A-8; D-2 – D-6), plus the trial court's express finding that Indyway's witnesses were "without credibility," and "impeached in so many different instances" (D-3) and that Indyway's central piece of evidence was and is an "***offensive contrivance***" (D-3), which were affirmed on appeal, review of Indyway's two issues would not be of any benefit to

the public or to the body of case law. Review would not yield any significant pronouncements on these statutes.

II. STATEMENT OF THE CASE

Indyway was created to evade taxes. A-3; Ex. 2, p. 12. Four parcels of real property were transferred to Indyway in 1992. *Ibid.* Indyway refused to pay property taxes despite receiving original tax bills, reminders from the County of Los Angeles ("County") about the delinquent taxes, and substitute tax bills. *Ibid.*; III RT 921:19-922:11. Indyway acknowledged in its minutes that it rejects any purported tax liability and admitted it never paid any income tax or even filed income tax returns. *Ibid.*; Ex. 1121; III RT 922:23-925:6. The County recorded Notices of Power to Sell the property in August 1997. A-3. After eight years of non-payment of property taxes, the County notified Indyway, both in writing and orally, that the property would be sold at auction in June 2000. A-4 – A-5. Indyway acknowledged in writing that it received the County's notices. A-5. Still, Indyway did not pay the taxes. A-6; III RT 906:2-8. Consequently, the property was sold at auction to Sung Won Yi ("Yi"). A-6. After the tax deeds were issued to Yi and the delinquent taxes paid in full from the auction proceeds, the County erroneously generated a Rescission of the notice of power to sell. A-7. The County quickly discovered its post-sale error and filed a cancellation of the Rescission. *Ibid.* Notably, the

Rescission and Cancellation thereof were not sent to Indyway or Yi; they were only recorded. II RT 328:2-5.

Indyway retained Opri to bring a claim against the County to recover the money from the auction proceeds that exceeded the property taxes that were in arrears. A-2. Opri did so and the matter settled with Indyway receiving the excess proceeds. I CT 152:7-8; I CT 171-175.

Despite the express scope of their retainer agreement, Indyway sued Opri in this legal malpractice lawsuit for failing to sue the County to set aside the sale. A-2. In order to prevail on its malpractice claim against Opri, Indyway was first required to show that it could have set aside the sale to establish damages. Thus, the trial was bifurcated. Petition, p. 5, ¶ 10. In the first phase, Indyway tried to prove that the sale would have been set aside. A-2. Indyway lost – badly. *Ibid.*; D-2 – D-3.

The substantial evidence showed that the County followed the law and mailed notices of the auction to Indyway at 11 conceivable addresses for Indyway, including Indyway's current address of record, its prior address, and the situs address. A-11 – A-12. Significantly, Indyway acknowledged receiving the County's notices at its current and former addresses, by signing and returning the notices to the County. *Ibid.*; D-5, ¶¶ 12-13. Additionally, County employees testified that they orally told Indyway about the auction. III RT 363:6-18.

At trial, Indyway's three principal witnesses claimed that persons other than Indyway signed and returned the notices and Indyway tried to manufacture evidence that it had notified the County that it changed its address. A-5. The trial court rejected Indyway's claims, stating that it gave "little credibility to [Indyway's] three principal witnesses," finding their testimony: "evasive," "not forthcoming," "suspect," "without credibility," and "impeached in so many different instances." D-3; A-5. As to Indyway's central piece of evidence (an alleged change of address notice), the trial court said that it was and is an "***offensive contrivance***." *Ibid.*

Significantly, Indyway did not raise the three statutes upon which it bases its petition as issues at trial. As this was a legal malpractice action, the validity of the statutes was never at issue. The trial court thereupon issued a statement of decision, making findings of fact, conclusions of law, and a decision – all in favor of Opri. D-1 – D-8. The trial court found that Indyway did not prove that it could have set aside the County's sale. D-7. Thus, Indyway could not prevail against Opri in this legal malpractice lawsuit. *Ibid.* In its statement of decision, the trial court only made one passing reference to section 3711, stating that there was no fraud in connection with the sale of Indyway's property. D-7. The trial court did not even mention either section 3691.1 or 4112 in its decision. D-1 – D-8.

Indyway appealed. Indyway never raised sections 3711 or 4112 as issues in its AOB. As a result, apart from one insignificant mention of section 3711, the Court of Appeal – in its *unpublished opinion* – did not issue any ruling on these statutes. A-11. While Indyway attempted to raise section 3691.1 as an issue on appeal, the Court of Appeal refused to hear it, stating that "sections . . . and 3691.1, are not preserved for review because these issues were not raised at trial" and section 3691.1 was not even "addressed in the [trial court's] statement of decision." A-15. The Court of Appeal added "[w]ere we to address the merits, we would conclude that these contentions are unsupported by evidence or any legal authority establishing that the alleged violations would constitute a basis to set aside a tax sale." *Ibid.*

The Court of Appeal easily found, given the substantial evidence in favor of Opri, and the trial court's credibility determinations strongly adverse to Indyway, that all of Indyway's arguments "are without merit." A-14.

III. REASONS FOR DENYING INDYWAY'S PETITION

A. Indyway Never Raised the Three Statutes as Issues at Trial and the Court of Appeal's Opinion Does Not Adjudicate Any Issues about Those Statutes

"A petition for writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10.

First, this Court's review lies from the Court of Appeal's decision. Supreme Court Rule 10(c). As the Court of Appeal has not issued a decision based on the three statutes set forth in Indyway's petition, there is nothing for this Court to review. It is axiomatic that "'[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'" *Pennsylvania Dept. of Corrections,* 524 U.S. 206 at pp. 212-213 quoting *Adickes*, 398 U.S. at p. 147, n. 2.

B. As the Court of Appeal Never Decided a Federal Question, There Is No Ground for Review

Second, Indyway never identifies any ground for review under Supreme Court Rule 10(c), e.g., a state court has decided an important federal question in a way that conflicts with a decision of another state court or a United States court of appeals, a state court has decided an important question of federal law that has not been but should be settled by this court, or a state court has decided an important federal question in a way that conflicts with a decision by this court. Here, as the Court of Appeal never decided an important federal question in this legal malpractice lawsuit, there is no ground for this Court's review.[3]

[3] Even if the California Court of Appeal *had* issued an opinion addressing these three statutes (which it did not), that

(Continued on following page)

Consequently, review by this court is neither appropriate nor warranted.

Even if a California Court had addressed the merits of Indyway's new argument or if this Court were to do so, the three statutes operate harmoniously and provide all required due process protections. Thus, the three statutes do not violate the Fifth and Fourteenth Amendments.

C. The Unequivocal Language of Section 3691.1 Was Followed by the County's Recordation of the Notice of Power to Sell Real Property; There Is No Conflict among Sections 3711 and 3691.1 and They Do Not Violate Due Process of Law

Indyway's first issue claims that section 3691.1 is ambiguous as to whether it requires the County to record a notice of power to sell *each* time a property comes up for a tax sale and thus, section 3711 should not be permitted to find the sale valid if the County

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opinion would not give rise to a federal question appeal as the only issue to be decided in this case is whether Opri committed malpractice. *Santisas v. Goodin,* 17 Cal.4th 599, 620 (1998) [decisions are only authority for issues "actually involved and actually decided" and not otherwise]. This lawsuit did not challenge the constitutionality of these statutes and was not brought against a governmental entity, who could have defended the constitutionality of the statutes. In sum, this is not the appropriate case to challenge the constitutionality of these statutes.

did not issue more than one notice of power to sell. Indyway's petition, p. 15. Indyway bases this claim on its assertion that the County "executive deleted" the original notice of power to sell. *Id.* at p. 17.

Preliminarily, Indyway never argued in the Court of Appeal that the County "executive deleted" the original notice of power to sell real property. A-14 – A-15; AOB. Thus, there is no foundation for this argument.

Second, section 3691.1 states that "[t]he tax collector shall execute a notice whenever a parcel becomes subject to the power set forth in section 3691 on a form prescribed by the Controller. The county clerk shall take acknowledgment of the notice without charge." The County followed this clear language – it recorded a notice of power to sell the relevant property. A-3. Indyway's argument that the County should be required to record subsequent notices has no support in section 3691.1. Further, Indyway's argument does not make sense – the notice is on record; there is no reason or purpose to record subsequent notices.

Third, Indyway never raised section 3711 in the California courts and is precluded from doing so now. *Pennsylvania Dept. of Corrections,* 524 U.S. at pp. 212-213.

In any event, section 3711 does not compete with section 3691.1. Section 3711 merely states that:

> "Except as against actual fraud, the deed duly acknowledged or proved is conclusive evidence of the regularity of all proceedings from the assessment of the assessor to the execution of the deed, both inclusive."

As these statutes facially demonstrate, there is nothing ambiguous about them. They are clear and straightforward. They do not conflict or compete with each other. They do not take property away from an owner without affording due process (notice of sale and an opportunity to be heard – by paying the delinquent taxes before the sale). Indyway had both actual notice (written and oral) of the auction and an opportunity to pay the delinquent taxes to avoid losing its property at auction; as a tax evader, it decided not to pay the taxes and subsequently, lost its property when it was sold to Yi at the County's auction. A-11 – A-13. Indyway has not presented any cogent argument as to how these statutes supposedly deprived them or deprive any California property owner of their due process rights.

D. The County Did Not Rescind the Original Notice of Power to Sell the Real Property and Indyway Did Not Redeem the Property; Thus, Destroying the Foundation of Indyway's Purported Second Issue

Indyway's second issue centers on its claim that the County rescinded the original notice of power to sell the real property and that it redeemed the property pursuant to section 4112 and thus, that the sale should not be valid under section 3711. Indyway's petition, p. i.

Though never raised by Indyway at trial or on appeal, section 3711 shows that the deed to Yi "is, in the absence of actual fraud, conclusively presumed regular in all respects when the deed to the purchaser at the public auction has been issued." *Herrington v. Weigel*, 82 Cal.App.3d 676, 683 (1978).[4]

Similarly, while Indyway never raised section 4112 at trial or on appeal, section 4112 concerns fees for redeeming property "prior to the proposed sale" and that such redemption would nullify the notice of the sale.

The substantial evidence found by the trial court, and affirmed on appeal, thoroughly undermines this Indyway claim. Substantial evidence showed that the

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[4] Both the trial court and the Court of Appeal found that Indyway did not prove any fraud in connection with the tax sale. A-14; D-7.

post-auction Rescission did not invalidate the sale and simply meant the delinquent taxes were paid with auction proceeds. A-14; II RT 378:19-28; II RT 318:16-28; IV RT 1519:1-1521:2. The Rescission cancelled the tax lien, but did not affect or cancel the sale. II RT 382:8-384:8; II RT 318:16-28.

Second, substantial evidence shows the Certificate of Redemption resulted from payment of the back taxes from the auction proceeds and did not mean Indyway redeemed the property. II RT 380:21-381:26; II RT 316:2-28; II 378:16-379:3; II RT 345:3-346:26. Indeed, Indyway admitted that it did not pay the back taxes. III RT 939:16-18; III RT 942:2-7. Accordingly, the County testified that Indyway's argument that Indyway redeemed the property is "without merit." II RT 384:4-8.

Third, substantial evidence shows that bona fide purchaser Yi – who did not have any prior dealings with Indyway – did not purchase or redeem the property for Indyway. A-14.

Fourth, the Rescission was recorded *after* the June 26, 2000 auction. A-7. "The right of redemption terminates at the close of business on the last business day prior to the date of the sale." § 3707(a)(1). That is because the property owner must pay the delinquent taxes the business day before the auction to stop the auction. A-6; II RT 379:14-22. Thus, the post-June 26, 2000 recorded Rescission and Cancellation thereof could not possibly support Indyway's argument that it redeemed the property (which can

only occur pre-auction) or that it was deprived of due process of law. A-14.

Thus, the substantial evidence showed that the County's post-auction Rescission did not affect the sale, much less nullify the original notice of power to sell recorded years earlier. A-14 – A-15. There is no issue, ambiguity, or conflict among sections 3711 or 4112, much less when applied to the facts here. Again, Indyway has not presented any valid argument that these statutes somehow, when applied, take away property without due process of law. The substantial evidence elicited at trial and as noted by the Court of Appeal conclusively established that Indyway had actual notice (written and oral) of the County's auction of the property and lost the property via the auction sale because Indyway failed and refused to pay property taxes. D-2 – D-7; A-14.[5]

IV. CONCLUSION

As Indyway never raised sections 3711 or 4112 in the courts below and the Court of Appeal did not issue a ruling on these statutes or section 3691.1, there is nothing for this Court to review. Indyway has not offered a single, valid reason why review of the Court of Appeal's unpublished opinion should be granted. In any event, the statutes are unequivocal,

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[5] As an aside, the trial court found that the County acted "admirably" and "went overboard" with its efforts to notify Indyway of the sale. V RT 2194:7-24.

not in conflict with each other or other parts of the Revenue and Taxation Code governing property tax sales, and application of them does not violate the Fifth and Fourteenth Amendments. Indyway had actual notice of the County's auction of the property because Indyway failed to pay property taxes; nonetheless, Indyway still refused to pay the taxes to avoid losing the property at the County's auction. This Court should therefore deny the petition for writ of certiorari.

Respectively submitted,

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